IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 8

UNITED STATES OF AMERICA,

Appellant,

—v.—

EUGENE FRANK ROBEL,

Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, *AMICI CURIAE*

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Interest of *Amici Curiae*

The American Civil Liberties Union and the American Civil Liberties Union of Washington, which file this brief with consent of the parties, appear *amici curiae* in this case because they believe that Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950 is unconstitutional on its face.

Indeed, the ACLU believes that the Subversive Activities Control Act is unconstitutional in its entirety. We believe that its purpose and effect is to remove from the people the right to judge ideas on their merits and to empower the government to label ideas as noxious by relying on their source alone and to penalize individuals

solely on the basis of their membership in an unpopular political organization. Cf. *DeJonge* v. *Oregon*, 299 U. S. 353 (1937).

The ACLU has appeared in every case before this Court in which any provision of the Subversive Activities Control Act was involved.[1] We appear again in this case because we believe that Congress does not have the power to exclude an individual from any form of employment solely because of membership in the Communist Party.

Statement of the Case[2]

On May 21, 1963 appellee was charged with a one count indictment filed in the United States District Court for the Western District of Washington with having violated Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U. S. C. §784(a)(1)(D). The indictment alleged: (1) that a final order of the Subversive Activities Control Board directing the Communist Party of the United States of America to register "as a Communist-action organization" had been in effect since October 20, 1961; (2) that the Secretary of Defense had, on August 20, 1962, designated the Todd Shipyards Corporation in Seattle, Washington, as a defense facility under Section 5(b) of the Subversive Activities Control Act of 1950, 50 U. S. C. §784(b); (3) that from November 19, 1962, and continu-

[1] See *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115 (1956), 367 U. S. 1 (1961); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *American Committee for Protection of Foreign Born* v. *Subversive Activities Control Board*, 380 U. S. 503 (1965); *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, 380 U. S. 513 (1965); *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965).

[2] Adapted from Appellant's brief.

ously to the date of indictment, appellee had "unlawfully and willfully engage[d] in employment" at the Todd Shipyards Corporation "while at the same time being a member of the Communist Party of the United States of America" and "having knowledge and notice" of both the order of the Subversive Activities Control Board and the designation of the Secretary of Defense.

On October 4, 1965, the District Court dismissed the indictment because it failed to allege that appellee was "an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party". The Court expressed the view that if the requirements of active membership and specific intent were not "deemed implicitly in the statute", Section 5(a)(1)(D) would encounter constitutional difficulties. It held, therefore, that a valid indictment under this statute must allege, and the government must prove at trial, that "the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes." The government appealed to the Court of Appeals for the Ninth Circuit which, on the government's motion, certified the appeal to this Court.

ARGUMENT

I.

The statute violates the First Amendment's guarantees of freedom of speech and freedom of association.

In *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964), Section 6 of the Subversive Activities Control Act, which made it a crime for any member of "a Communist organization" to make application for a passport, was declared unconstitutional on its face on the ground that it violated the constitutionally guaranteed right to travel. The statute was struck down because it encompassed "both knowing and unknowing members", *id.* at 510, and rendered irrelevant the member's "degree of activity in the organization and his commitment to its purpose", *ibid.*, or the "security sensitivity of the area in which he wishes to travel", *id.* at 512. This Court held:

> "The section, judged by its plain import and by the substantive evil which Congress sought to control sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in the places for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil', cf. *Cantwell* v. *Connecticut*, 310 U. S. at 307, yet here, as elsewhere,

precision must be the touchstone of legislation so affecting basic freedoms, *NAACP* v. *Button,* 371 U. S. at 438" (378 U. S. at 514).

The constitutional defects of Section 6 are identical to these which render Section 5 unconstitutional on its face. There is neither any requirement under the statute, nor is it charged in the indictment, that the defendant had engaged in unlawful activity, or that he had taken part in any "Communist action", either actively or inactively, or that he concurred in such action, or sympathized with it, or that he even knew that such action was taking place.[3] There is no requirement in the statute and no charge in the indictment that this defendant had committed any unlawful act of any kind in connection with his employment in the "defense facility". A blanket prohibition which applies notwithstanding the absence of any such criteria is guilt by association with a vengeance. As this Court said in *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460-461 (1958):

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which

[3] Moreover, there is no requirement in the statute (and no corresponding allegation in the indictment) that *any* unlawful action be taken, or even threatened, by the "Communist action organization."

> embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to closest scrutiny."

The primacy of the First Amendment compelled this Court in *Scales* v. *United States*, 367 U. S. 203 (1961), and *Noto* v. *United States*, 367 U. S. 290 (1961), to read into the membership clause of the Smith Act, in order to sustain its constitutionality, the following ingredients: (1) That the accused was an "active member" (2) of an organization which advocated the overthrow of the government of the United States by force and violence, and that (3) the accused had a specific intent to accomplish overthrow as speedily as circumstances would permit.

The Court in *Scales* specifically held that the First Amendment was not infringed by the membership proscription of the Smith Act only because:

> "The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence' . . . " 367 U. S. at 229.

On the other hand:

> "If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired." *Ibid.*

In *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966) this Court held unconstitutional an Arizona statute subjecting to prosecution for perjury and discharge from public office anyone who took the loyalty oath required of state employees and who thereafter "knowingly and wilfully becomes or remains a member of the Communist Party" or "any other organization" having for "one of its purposes" the overthrow of the government of Arizona, where the employee had knowledge of the unlawful purpose. The Court viewed its decisions in *Scales*, *Noto*, and *Aptheker* as recognizing that organizations may embrace both legal and illegal aims and established beyond any legal doubt that "proscription of mere knowing membership, without any showing of 'specific intent' [to further the unlawful aims of the organization], would run afoul of the Constitution." 384 U. S. at 16.

Since the Arizona statute was not restricted in scope to employees who joined a forbidden organization with a specific intent of furthering the organization's illegal objectives, but instead subjected to immediate discharge and criminal penalties *all* employees who were knowing members, this Court concluded that it infringed the freedom of association protected by the First and Fourteenth Amendments. The Court stated, in language particularly pertinent here, that:

> "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. . . .

"This Act threatens the cherished freedom of association protected by the First Amendment . . . A statute touching those protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.' . . . Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' . . . " 384 U. S. at 18.

The Government attempts to distinguish *Aptheker* v. *Secy. of State*, 378 U. S. 500 (1964) by making essentially two arguments: (1) that the risk to national security which Section 5(a)(1)(D) guards against is a much greater risk, than that guarded against by Section 6; and (2) that a restriction on freedom of travel is "more basic" than a restriction "which affects only the right to be employed in a defense facility" (Gov. Brief, pp. 46-47). In effect, the Government argues that in *Aptheker* there was less danger to national security, and a greater infringement on liberty, than there is here. Neither argument is tenable. Such evidence as is available refutes rather than supports the Government's contention.

In the Congressional findings of necessity, in Section 2 of the statute, Title 50, U. S. C., §781, one of the principal areas of concern expressed by Congress is the considerable movement in and out of the United States of "subversive" persons whose travel is in furtherance of the purposes of the "*world* Communist movement . . . to establish a Communist totalitarian dictatorship in the countries *throughout the world* . . . " (¶1). It is stated, in paragraph 4 of the findings that "The direction and control of the *world* Com-

munist movement is vested in and exercised by the Communist dictatorship of a *foreign* country". And in paragraph 5, Congress has found that one of the functions of the *world* Communist movement is to spread its activities to various other countries as part of a "*world-wide* Communist organization . . . subject to the discipline of the Communist dictatorship of such *foreign* country." References to the constant world-wide activities of the world Communist movement, and of which Communist action organizations in the United States are a disciplined part, are liberally distributed among most of the 15 paragraphs of Congressional findings. See paragraphs 6, 7, 8, 9, 10, 12, 13 and 14.

Paragraph 8 refers particularly to "*travel* of Communist members, representatives, and agents *from country to country*" which "facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." Paragraph 12 refers further to *world-wide* travel back and forth as facilitating the aims of the Communist movement, and paragraphs 13 and 14 deplore the existence of loopholes in the immigration and nationality laws. (Emphasis added in all references to statutes.)

On the other hand, none of the paragraphs in the Congressional findings contain any reference to the danger to the national security which is presumably sought to be protected by Section 5(a)(1)(D). In paragraph 11, there is a reference to "clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law". But if this is what Section 5(a)(1)(D) is meant to deal with, there is no support therefor in the legislative history presented in the

Government's brief (pp. 32-34). And even if the Government's attempt to have 1962 legislative history retroactively applied to 1950 (Gov. Brief, pp. 33-34) is of any persuasiveness, it is surely a much weaker case than all of the specifications in the statute itself, and in the legislative history, which show the *world-wide* nexus of international Communist travel as an area of prime Congressional concern.[4]

The Government's argument that there is a greater individual freedom at stake when the right of travel is restricted than where the right of employment is restricted, is perhaps wider of the mark than the effort to distinguish *Aptheker* in terms of lesser danger. Although large numbers of Americans travel and utilize passports, surely the number of Americans who must work for a living is even greater than the number who travel abroad, for whatever reason. Indeed, an element of the right to travel is the right to travel for the purpose of seeking and obtaining employment elsewere. *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958). See *Edwards* v. *California*, 314 U. S. 160 (1941). As Mr. Justice Goldberg pointed out in *Aptheker*, *supra*, one of the vices of Section 6 was that it would prevent a scholar from doing research at a European university. However, the restriction of Section 5(a)(1)(D) does not just apply to a scholar who wants to read rare manuscripts at

[4] Compare the thorough elaboration of legislative history of travel restrictions set forth in pages 25-35 of the Government's Brief in *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964). There is nothing in the Government's Brief in *Aptheker* which even remotely suggests that travel restrictions involve "a much lesser risk to national security" (Gov. Brief, this case, p. 46) than *any* other restrictions.

the Boedleian Library at Oxford. It applies to millions of Americans who might want to work in a shipyard.[5]

That "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom" which is protected by substantive due process, has been clear at least since *Truax* v. *Raich*, 239 U. S. 33, 41 (1915). In *Greene* v. *McElroy*, 360 U. S. 474, 492 (1959), this Court held that "the right to hold specific private employment" was protected by the Fifth Amendment against the Federal Government's unreasonable interference.

Though, it might be argued that the right to work is no more precious than the right to travel abroad, it is totally baseless to argue, as does the Government, that the right to foreign travel is a *more* fundamental liberty than the right to work in one's own country. It follows that if *Aptheker* is undistinguishable, this Court must rule here as it did there.

In an additional attempt to sustain the constitutionality of Section 5(a)(1)(D), the government resorts to constitutionally impermissible generalities regarding the danger

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[5] Because of the proportions of the sanction involved, restrictions on the "basic individual right to work" cannot be justified on the same grounds as would justify restricting a right to hold union office. See *Aptheker* v. *Secretary of State*, 378 U. S., at 513, n. 11. Consequently, the constitutional validity of §9(h) of the Taft-Hartley Act, *American Communications Assoc.* v. *Douds*, 339 U. S. 382 (1949), is no precedent for the constitutional validity of §5(a)(1)(D). The attempt in the Government's Brief (pp. 31, 45, 48), to secure the imprimatur of this Court on basic restrictions of the individual right to work, by reference to *Amer. Comm. Asso.* v. *Douds, supra*, is unsupportable and must fail. See *United States* v. *Brown*, 381 U. S. 437 (1965).

which that section is said to be directed against.[6] For example, the government says that Section 5(a)(1)(D) "was designed to protect essential defense installations against sabotage and espionage" (Gov't. Brief, p. 14); that the Section is "part and parcel of the Federal Loyalty-Security Program which is designed to prevent espionage and sabotage within the Federal government and in defense installations" (*Id.* at 15); that the legislative history of the Section shows "general agreement on the proposition that substantial dangers of espionage and sabotage were presented by the employment in defense facilities of members of Communist organizations" (*Id.* at 25); that "The employment of known Communists in this type of facility enhances the possibilities of sabotage. Common sense dictates

[6] It is extremely interesting to note that notwithstanding all of the Government's bold generalizations about how §5(a)(1)(D) aids the national security, not a single specific instance has been cited, either from case reports, reports of the Subversive Activities Control Board, or any other documented source, indicating the existence of an industrial security problem which only §5(a)(1)(D) can solve. We have had the Subversive Activities Control Act for sixteen years, and it was in existence for almost thirteen years prior to the indictment of appellee. Surely if the security of the Republic has suffered because of the absence of the protections and sanctions of §5(a)(1)(D), it would have been apparent in some documentable way.

On page 28 of the Government's Brief, the Court is advised "that the total number of facilities designated by the Secretary of Defense is approximately 3,000" comprising less than 1% of all manufacturing and production plants in the country. But the Court is not advised as to the number of employees covered. Nor is the Court advised of the number of security incidents, or of even a single incident, although the Government characterizes this information as "statistics" (Brief, p. 29).

In a final resort to hyperbole, the alarm is sounded lest "vital nuclear secrets" be made available to persons such as appellee (Gov't. Brief, p. 56). But it is elementary that the protection of our nation's nuclear secrets does not rest on such a clumsy device as §5(a)(1)(D).

the removal of such individuals from these plants." (*Id.* at 26, quoting testimony given to a Senate Subcommittee on Internal Security five years after the statute was passed.) And finally "In this case the 'end' is the protection of defense facilities essential to the national security from espionage and sabotage" (*Id.* at 30). And the government concludes "The means chosen—(1) an absolute prohibition upon employment in such facilities (2) of members of Communist-action organizations (3) punishable by imprisonment and fine—are plainly 'appropriate' to that end" (*Ibid.*).

The Government may regard Section 5(a)(1)(D) as "appropriate" to protect the national security, just as it similarly regarded Section 6. *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505 (1964). But this Court ruled in *Aptheker* that the First Amendment will not tolerate a statute which, in a purported attempt to protect the national security, imposes criminal guilt without regard to the defendant's knowledge of wrongdoing, degree of wrongdoing, or even the objective existence of wrongdoing. *Amici* urge that this Court must likewise declare that §5(a)(1)(D) is violative of the First Amendment, and for the same reasons of overbreadth.

Protection against espionage and sabotage is certainly a legitimate and proper function of government. Where the First Amendment is involved, however, it is only a "narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society." *Burstyn* v. *Wilson*, 343 U. S. 495, 505 (1952). Though Congress has constitutional authority to legislate in the area of espionage and sabotage, it may do so only

with a scalpel, not a broadsword.[7] See *Lovell* v. *Griffin*, 303 U. S. 404 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); *Carlson* v. *California*, 310 U. S. 106 (1940).

The government has recognized this constitutional limitation, at least in other cases. For example, in *McBride* v. *Roland*, U. S. Court of Appeals for the Second Circuit, Docket No. 30331 (argued October 6, 1966), the Court of Appeals has under review an appeal on behalf of a merchant seaman who was denied security clearance under the government's port security program because of long held, though now terminated, membership in the Communist Party. Appellant attacked the relevant Coast Guard regulations (33 CFR §§121.01-121.29), arguing that they are unconstitutional on their face because they exclude merchant mariners from employment solely because of bare membership in the Communist Party. The government responded (Gov. Brief, p. 33):

> "The short answer is that the regulation clearly requires a careful examination of the qualitative and quantitative nature of the applicant's 'membership' since it provides only that such membership 'may preclude' validation of his mariner's document. The language of the regulation certainly warrants the conclusion that bare membership in the Communist Party, unaccompanied by knowledge of the Party's illegal objectives, would not support denial of security clearance."

Thus the government is perfectly capable of acknowledging what Mr. Justice Douglas said in *Black* v. *Cutter Laboratories*, 351 U. S. 292, 304 (1956) (dissenting opinion):

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[7] See 18 U.S.C. Chap. 37 (Espionage) and Chap. 105 (Sabotage).

> "I do not think we can hold consistently with our Bill of Rights that Communists can be proscribed from making a living on the assumption that wherever they work the incidence of sabotage rises or that the danger from Communist employees is too great for critical industry to bear."

That it fails to acknowledge it in this case reflects an inflexible attachment to a period of national history that is stale at best. Cf. *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board,* 380 U. S. 513 (1965).

II.

The statute violates the Fifth and Sixth Amendments.

The most significant element of the crime charged is that appellee is a member of an organization which has been ordered to register as a "Communist action organization." But under the statute and the indictment, proof that the organization to which the defendant belongs is in fact a "Communist action organization" is not judicially determined with the traditional constitutional safeguards accorded defendants in general. This ultimate fact, rather, has been determined in advance of trial by the Subversive Activities Control Board without any notice to appellee, without his being confronted with his accusers, without the right of jury trial, without the proof of the facts beyond reasonable doubt. In addition, this determination was made many years before the date appellee is charged with having any connection with the Party.[8]

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[8] In *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 113 (1961) Mr. Justice Frankfurter was careful to

As a consequence of the statutory scheme, the triers of fact are left with nothing to try. Appellee's criminality has been determined in advance of trial. To declare certain acts "to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial." *Wong Wing* v. *United States,* 163 U. S. 228, 237 (1896).

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point out that many of the factual referents in the statute which formed the constitutional basis for the validity of the order requiring the Communist Party to register as a Communist action organization, might be subject to change as world conditions changed:

> "If, in future years, in a future world situation, the Soviet Union is no longer the foreign country to which . . . [certain sections of the statute] refer—so that substantial domination by the Soviet Union would not bring an organization within the terms of . . . [the Act] that too will be a matter of statutory construction . . . The Board or a reviewing court will be able to say that the 'world Communist movement', as Congress meant the term in 1950 . . . no longer exists, or that Country X or Y, not the Soviet Union, now directs it."

Under the indictment as drawn, or even under a hypothetical indictment which might be redrawn consonant with the District Court's opinion, it would be impossible for appellee to introduce any evidence tending to show precisely those changes which Mr. Justice Frankfurter, writing for the Court, foresaw as very much within the realm of possibility.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

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